STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-704

June 16, 2004

PUBLIC UTILITIES COMMISSION
Investigation of Skowhegan OnLine Inc.'s Proposal for UNE loops

ORDER ON RECONSIDERATION

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny Verizon-Maine's (Verizon) request for reconsideration of our April 20, 2004 Order requiring Verizon to provide competitive local exchange carriers (CLECs) with access to the unbundled copper subloop requested by Skowhegan OnLine, Inc. (SOI).

II. BACKGROUND

On April 20, 2004, we issued an Order finding that, pursuant to our authority under 35-A M.R.S.A. §§ 1306 and 7101, Verizon must provide CLECs with access to the unbundled copper subloop requested by SOI in this proceeding (SOI subloop). We also found that SOI did not need to participate in Verizon's *bona fide request* process and that Verizon could file prices, terms and conditions for the SOI subloop that are consistent with the Order and the pricing methodology described in our Orders in Docket Nos. 98-758 and 2002-578. Pending approval of those prices and schedules, we required Verizon to provide the SOI subloop at the current TELRIC rates for UNE loops and make the new subloop available to SOI and other CLECs no later than April 30, 2004**.**

On May 10, 2004, Verizon filed a Motion for Reconsideration arguing that our Order was infirm and asking that we rescind it. Verizon raised three possible bases for reconsideration. First, Verizon agued that the Commission does not have authority to order unbundling pursuant to state law because the Legislature has not explicitly granted that authority nor is such authority necessarily implied from any other explicit delegation of authority. Specifically, Verizon claims that 35-A M.R.S.A. § 1306 is a procedural grant and not a substantive delegation and that 35-A M.R.S.S. § 7101 is only a "substanceless policy declaration." Second, Verizon argues that even if the Commission has implied authority to order unbundling under state law, it exercised that authority unlawfully by failing to give Verizon notice that the Commission was considering a state law basis for unbundling and by irrationally linking SOI's testimony regarding impairment and the legislative policy expressed in section 7101. Third, Verizon argues that our decision is preempted by the Federal Communications Commission's (FCC) *Triennial Review Order* (*TRO*)[1] and the D.C.

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (rel. August 21, 2003) (*Triennial Review Order or TRO)*.

Circuit Court of Appeal's decision in *USTA II*.[2] Specifically, Verizon alleges that our Order frustrates "Congress's objective for a pro-competitive, de-regulatory national policy framework for promoting accelerated investment in new telecommunications technologies." Verizon claims that our Order reinstates a UNE expressly removed by the FCC and that it removes the incentive that the FCC found crucial to "motivate CLECs to build out their own fiber transmission facilities."

III. DECISION

Rule 1004 of Chapter 110 requires a party seeking reconsideration of a Commission order to set forth the specific grounds for reconsideration and the relief requested. Generally, a party seeking reconsideration should not merely reiterate earlier arguments that have already been addressed by the Commission but instead raise issues concerning material error or matters that appear to have been overlooked or not addressed by the Commission. The arguments raised in Sections I and II of Verizon's Petition contain allegations of material error and arguments not previously considered and will be addressed in this Order on Reconsideration. Section III of Verizon Petition reiterates arguments which have already been heard and addressed by the Commission at pp. 15-21 of our April 20th Order and will not be considered further in this Order.

A. Authority to Order Unbundling

We do not find our authority under sections 1306 and 7101 to be as narrow as Verizon suggests. Contrary to Verizon's arguments, Section 1306 is not merely a procedural provision of state law; it explicitly includes authority to compel a utility to take actions, including offering a specific service to a customer if failure to do so would be unreasonable. If, for example, the Commission concluded, after hearing, that service to a particular community was inadequate, we could compel Verizon to make upgrades to its network.[3]

In the alternative, if Verizon is correct that section 1306 must depend on other statutes, we find that standards in Section 301 as well as those set forth in Section 711, allow us to reach the same result. Section 301 requires that all utilities provide "safe, reasonable and adequate facilities and service." This provision applies equally to wholesale and retail facilities and thus, when combined with section 1306, provides ample authority for the Commission to order Verizon to make certain facilities available to wholesale customers such as CLECs. Section 711 grants the Commission authority to order the joint use of conduits, subways, wires, poles, pipes or other equipment and "prescribe reasonable compensation and reasonable terms and conditions for the joint use…" While this provision has traditionally been applied in the context of pole attachment

[2] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)

[3] *See Investigation into Bell Atlantic-Maine's Network Congestion Relief Practices*, Docket No. 99-132 Order (July 21, 1999); *Investigation into the Adequacy of Utility Services in Maine During Power Outages,* Docket No. 2002-151, Order (Nov. 14, 2003).

issues, we find that it supports our determination under section 1306 that the Commission has authority to require Verizon to allow joint use of its wires by offering the SOI subloop on an unbundled basis.

Finally, section 7101, especially subsection (4),[4] expresses quite clearly the Legislature's policy objective of supporting broadband deployment throughout the state. The Law Court has already found that the Commission has all the implied and inherent powers necessary to implement the objective set forth in section 7101. Specifically, in *New England Telephone v. PUC,* 1997 ME 222**,** the Law Court found, with respect to 35-A M.R.S.A. § 7101, that:

> The legislature has specifically provided in Me. Rev. Stat. Ann. tit. 35-A, § 7101(1)(Supp. 1996) that it is the policy of Maine that telephone service must continue to be universally affordable, especially to the poor at affordable rates, and that a modern state-of-the-art telecommunication network is essential for the health and vitality of the state and the improvement in the quality of life for all of Maine citizens. Me. Rev. Stat. Ann. tit. 35-A, § 7101(2) (Supp. 1996). The public utilities commission has all implied and inherent powers under Title 35, which are necessary and proper to execute faithfully its express powers and functions. Me. Rev. Stat. Ann. tit. 35-A, § 104 (1988).

Thus, we find that the clear policy objective contained in section 7101, when combined with our broad mandate to ensure that utility practices and rates are reasonable pursuant to section 1306, provides us with the necessary authority to require Verizon to unbundle its legacy copper network. Indeed, with respect to the plant put into the ground under Verizon's former franchise monopoly service, we have a greater obligation to ensure that the plant is used at its highest level of efficiency, including making parts of it available to wholesale customers.

B. Lawful Exercise of Authority

We are not persuaded by Verizon's claim that we did not lawfully exercise our unbundling authority under state law. First, contrary to Verizon's assertions, notice was given to all parties that the Commission might exercise state law authority. In a June 23,

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[4] 35 M.R.S.A. § 7101(4) provides as follows:

> **4. Information access**. The Legislature further declares and finds that computer-based information services and information networks are important economic and educational resources that should be available to all Maine citizens at affordable rates. It is the policy of the State that affordable access to those information services that require a computer and rely on the use of the telecommunications network should be made available in all communities of the State without regard to geographic location.

2003 Procedural Order, the Hearing Examiner specifically asked all parties to provide briefs on "a state commission's authority to order additional UNEs or conditions relating to UNEs beyond those required by the FCC." Later, in a September 10, 2003 Procedural Order, the Hearing Examiner asked the parties to provide briefs in response to the following question: "Are states preempted from defining the term "loop" in a way that deviates from the FCC's definition of a loop?" While Verizon is correct that the Hearing Examiner's analysis focused on federal law (due in large part because that is what the parties focused on), Verizon was given repeated opportunities to address our authority under state law and chose not to provide any briefing on the subject. Any failure to notice the state law issues was cured by Verizon's ability to address those issues in its Motion for Reconsideration – which is what it has done.

We are also not persuaded by Verizon's arguments concerning the need for additional factual evidence on the questions of whether we have authority to order unbundling under state law and whether SOI is impaired without access to the SOI subloop. Our authority to order unbundling under state law is a question of law, not of fact, and thus we see no need for submission of facts on that issue. As for impairment, Verizon admits that it *chose* not to challenge SOI's allegations of impairment and cannot now claim that it was denied an opportunity to present evidence or challenge that put forth by SOI and the other CLECs.

The evidence in the record shows that SOI will use the new UNE for deploying broadband in areas currently with no access to broadband, which clearly will further the policy objectives of section 7101. Verizon's suggestion that unbundling the SOI subloop could impede Verizon's investment ignores the fact that the only facilities being unbundled are copper wires that are already part of Verizon's copper distribution network, rather than the next-generation fiber facilities currently being installed by Verizon. As we stated in our earlier Order, the FCC's focus on providing ILECs and CLECs the incentive to invest in new technologies does not apply to existing copper feeder because those facilities have long been deployed and their costs are sunk.

III. CONCLUSION

For the reasons discussed above, we deny Verizon's Motion for Reconsideration.

Dated at Augusta, Maine, this 16th day of June, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.